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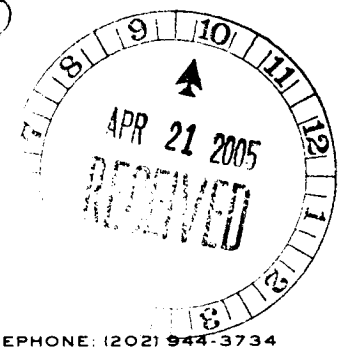

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April 21, 2005

Vernon A. Williams
Secretary
Surface Transportation Board
The Mercury Building
1925 K Street, NW #700
Washington, DC 20423

Re: STB Ex Parte No. 656
Motor Carrier Bureaus—Periodic Review Proceeding

Dear Secretary Williams:

Enclosed please find the original and ten copies of the Rebuttal Comments of National Motor Freight Traffic Association, Inc. (NMFTA) and the National Classification Committee (NCC) provided for in the Surface Transportation Board's Decision served in the above-styled proceeding on December 13, 2004. Also enclosed is an IBM-compatible CD in Microsoft Word.

NMFTA is the applicant in Section 5a Application No. 61.

Thank you for your assistance in this matter.

Sincerely,

John Bagileo

John R. Bagileo
Counsel for National Motor Freight Traffic Association, Inc. and the National Classification Committee

Enclosures

ORIGINAL

Before The
Surface Transportation Board

STB Ex Parte No. 656
Motor Carrier Bureaus—Periodic Review Proceeding

Rebuttal Comments Of National Motor Freight Traffic Association, Inc. And The National Classification Committee Section 5a Application No. 61

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Traffic Association, Inc. and the
National Classification Committee

Due and Dated: April 21, 2005

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SECTION I

REBUTTAL STATEMENT

OF

WILLIAM W. PUGH

I.
Rebuttal Statement
Of
William W. Pugh

I previously submitted Opening and Reply Statements on behalf of the National Motor Freight Traffic Association, Inc. (NMFTA), of which I am the Executive Director, and the National Classification Committee which I serve as Secretary. These comments are submitted in rebuttal of statements in the joint reply of the National Small Traffic Shipments Conference, Inc. (NASSTRAC) and the National Industrial Transportation League (NITL), jointly referred to as NASSTRAC/NITL, the reply of the U.S. Department of Transportation (DOT), and the reply of the American Lighting Association (ALA).

At the outset, I must point out that the NASSTRAC/NITL statement that the NCC did not mention the legislative history of the Motor Carrier Act of 1980 is absolutely untrue. Reference to page 12 of my March 2, 2005 Statement and page 3 of the NCC's legal argument in our opening comments demonstrate that the legislative history of that Act strongly affirms Congress' recognition of the critical importance of the freight classification to motor carrier transportation.

Interestingly, NASSTRAC/NITL selectively cites introductory language involving, in part, the collectively-made classification which states that:

> No issue has received more attention during the debate before the Committee than whether this immunity should be allowed to continue. The debate centered on whether there continues to be a reasonable public quo in return for the collective ratemaking quid of the Reed-Bulwinkle Act.

What NASSTRAC/NITL fails to relate is the conclusion the Committee reached in continuing antitrust immunity for collective classification-making activities. As was cited in our Opening Comments, and repeated here, it stated:

> [T]he Committee is of the view that the commodity classification system currently in place is a useful tool for shippers, receivers and transporters of regulated freight [s]o all "know what they are talking about" thereby contributing to an efficient and economical transportation system. (H.R. Rept. No. 96-1069, 96th Cong., 2d Sess., p. 28 (1980).)

The value of the classification to all segments of the motor carrier transportation industry has been well recognized by Congress.

NASSTRAC/NITL has chosen to run together, without distinction, its alleged concerns about the collective classification-making process and the collective ratemaking process, even though those procedures and purposes are recognized as being entirely separate and distinct. (See NASSTRAC/NITL Reply, p. 2) My comments are directed to those criticisms which appear to address the NCC classification procedures.

In listing the purported "concerns that led the Shipper Associations and other shipper parties to call for termination or modification of antitrust immunity for carrier collective action " NASSTRAC/NITL ignores the STB's rejection or dismissal of these very same "concerns" that these shipper groups had asserted during the course of the agency's exhaustive examination of the NCC's procedures in a six-year proceeding that just ended in December of 2003. In essence, NASSTRAC/NITL's attempt to resurrect these discredited arguments constitutes an impermissible appeal of the STB's decisions before there is sufficient evidence to evaluate either the efficacy of the STB's prescribed modifications to the NCC's Section 5a Agreement or the NCC's compliance with its new Agreement.

While alleging a "lack of transparency," NASSTRAC/NITL fails to identify any specific aspect of the classification process to which it is referring. By virtue of the 2003 modifications made to the NCC's classification procedures, all reports, analyses, and the NCC's public docket files are open to public inspection via the Internet or through request. The NCC's meetings are all open to the public and interested persons have the opportunity to make oral presentation and/or present written comments. The persons docketing proposals are identified and the votes cast are open to public inspection. Moreover, the NCC may be obliged to justify the reasonableness of any classification decision before a neutral arbitrator, the Board, or the NCC through reconsideration. The allegation that there is no or too little transparency in the classification process simply cannot be justified.

Once more, the contention of "disparate burdens, with the result that higher class ratings predominate" is unsubstantiated. Under the NCC's procedures any person who determines for any reason that his or her products deserve lower classification ratings have complete access to the classification process to do so. Not only is NMFTA staff available to assist the shipper in submitting an appropriate proposal, but staff, on a direct cost reimbursement basis, will assist the shipper in putting together the information which would support the proposal. Similarly, the data that a shipper may wish to present in opposition to a classification proposal normally is transportation information that is readily available to the company regarding its products. If assistance is needed in compiling the information, the NMFTA staff is available, on a direct cost reimbursement basis, to assist the shipper. Moreover, staff is obligated to notify the NCC whenever the

information compiled may justify a reduction in the present classification applicable on the involved articles.

NASSTRAC/NITL argues that there are "standards that favor carriers over shippers." As discussed in our reply comments, NASSTRAC/NITL's contention that there should be a linear relationship in density classes is misguided and in error. It should be recognized that the density guidelines utilized in assigning class ratings have been before the ICC and the Board in a number of proceedings over the years, and the established density/class rating guidelines have been found to result in reasonable classifications and reclassifications for literally thousands of articles moving in interstate commerce. The remaining transportation characteristics of handling, stowing and liability have been identified and prescribed by the ICC, and are well known in the transportation community. There is no merit to the contention that the long-recognized and agency-approved classification standards favor carriers over shippers.

There is no limitation on the voice of shippers in the classification process, as NASSTRAC/NITL and ALA imply, other than the fact that they cannot vote on classification proposals affecting their products or those of their competitors, or other persons. NASSTRAC/NITL cites no statutory authority which would sanction shippers becoming parties to a motor carrier collective classification-making agreement, or by what authority the Board would extend antitrust immunity to such shippers. Practical questions also abound as to the impartiality which would or could be exercised by shippers voting on classification proposals, particularly in light of the strident opposition to the continuation of the classification process expressed by NASSTRAC/NITL and the lamps and lighting fixture manufacturers and trade associations. It must be emphasized

that the shipper associations now arguing for the right to vote on classification matters are the same organizations which insisted that classification decisions could only be fair if submitted to a neutral arbitrator—a process in place for more than 14 months without a single shipper request for arbitration. Shipper voting is simply another trial balloon floated by NASSTRAC/NITL to disrupt the classification process by placing in the hands of affected shippers the ability to defeat reasonable classification changes. That is not the intent of the Act in placing classification matters in the hands of the carriers to make determinations concerning the relative transportability of articles in their vehicles.

DOT counsel argues that "continued approval and immunity is not necessary for the production of a standard classification system ." (DOT Reply, pp. 6, 8) Other than counsel's opinion, no legal authority is provided supporting that assertion. Congress, which has continued to provide antitrust immunity for collective classification-making agreements through the numerous legislative rewrites dealing with collective activities by motor carrier associations, apparently does not share that view. Additionally, other legal experts have indicated that classification does involve the risk of antitrust violations. As was pointed out in Antitrust & Trade Associations, How Trade Association Laws Apply To Trade and Professional Associations, A.B.A., Section of Antitrust Law (1996):

> Absent an express antitrust exemption, the activities of all trade and professional associations are plainly subject to the antitrust laws. Association activities can present antitrust concerns simply because they consist of activities engaged in by competitors. Trade association activities can permit antitrust problems from a vertical (i.e., distributional) as well as horizontal (i.e., competitive), perspective.
>
> * * *
>
> Often activities by trade or professional associations, by their very nature, constitute a "contract," "combination," or "agreement," as those terms are defined under the Sherman Act. As such, one of the threshold elements of section 1 of the Sherman Act is

> automatically established. The second crucial element under section 1 of the Sherman Act, whether any trade association conduct unreasonably restrains trade, is dictated by the nature and purpose of the particular association activity. Thus, the nature and effect of association programs need to be evaluated continuously for compliance with antitrust principles. Generally, trade and professional association activities that are challenged under the antitrust laws will be subject to a "rule of reason" analysis, absent conduct which rises to the level of price fixing, allocation of markets or customers, or other "naked restraints" on competition.
>
> Under a "rule of reason" analysis, associations usually can engage in a substantial number of activities without serious antitrust concerns. These activities include sponsoring trade shows, publishing trade journals, collecting and disseminating industry data, lobbying, product and market research, advertising and promotion, seminars for industry members, monitoring and reporting on government actions, and educational activities in areas such as marketing, product development, codes of ethics, and best industry practices. Association activities that have caused antitrust problems include the exchange of price-related information (including cost or profit data), development of terms or conditions of sale, methods of distribution, joint research, and product standards and certification programs. (Emphasis added) (At pp. 2-3)

The broad nature of association activities identified as subject to the risk of antitrust problems are of great concern to NCC member motor carriers who have indicated on numerous occasions that without the protection of antitrust immunity they could not risk participating in the collective classification process. DOT's gratuitous assertion that antitrust immunity is not needed for classification matters is made without any substantiation, and ignores the clear terms of the Act and the firm conclusions reached by recognized antitrust experts.

The ALA, NASSTRAC/NITL and DOT argue, in various contexts, that granting antitrust immunity in today's deregulated economy is not appropriate. (See, e.g., ALA Reply, p. 1) The issue here is not whether antitrust immunity should or should not be provided to collective activities. Congress has already made that determination in the

affirmative in its many reviews of the collective process—most recently in the Motor Carrier Safety Improvement Act of 1999. This proceeding is the required 5-year periodic review to determine what further action, if any, is "necessary to protect the public interest." The determination of the public interest looks to the implementation of the goals of the National Transportation Policy, not to the wisdom of providing antitrust immunity to protect the involved collective activity. Significantly, no evidence of any kind has been presented which demonstrates, much less establishes, that the collective classification of commodities impairs or negatively impacts any of the National Transportation Policy objectives. To the contrary, as indicated above, Congress has recognized that the commodity classification currently in place contributes "to an efficient and economical transportation system" which are the stated goals of the NTP.

Contrary to NASSTRAC/NITL's assertion, the NCC does not center its argument, that there is no basis for the further modification or termination of its Section 5a Agreement, on the demonstration that the NCC is operating in compliance with the terms of its Agreement as recently approved by the STB. (NASSTRAC/NITL Reply, p. 1) Certainly, NCC does, and must, comply with the procedures approved in its Section 5a Agreement. But, the NCC's position that no need for further change has been shown is predicated on the fact that this record does not establish a basis for any additional requirements which must be included in the NCC's procedures in order to protect the public interest. As indicated, opposition to antitrust immunity does not suffice, and is actually immaterial to a public interest determination. NASSTRAC/NITL's contention that the NCC has failed to justify maintaining the status quo is misplaced.

(NASSTRAC/NITL Reply, p. 5) It is NASSTRAC/NITL's burden to show that the status quo fails to protect a bona fide public interest requirement, a burden which has not been met on this record.

Respectfully submitted,

William W. Pugh
Executive Director
National Motor Freight Traffic
Association, Inc.

SECTION II

REBUTTAL STATEMENT

OF

JOEL L. RINGER

II.

REBUTTAL STATEMENT OF JOEL L. RINGER

This statement is submitted by Joel L. Ringer, Manager of Classification Development for the National Motor Freight Traffic Association, Inc., and National Classification Committee, 2200 Mill Road, Alexandria, Virginia 22314, in rebuttal of the comments made by the American Lighting Association (ALA).

ALA's Opening Comments Do Not Appear on the Record of This Proceeding

In its letter of March 22, 2005 to the Surface Transportation Board, ALA refers to a January 18 letter that it allegedly had submitted to the STB in connection with the instant proceeding. Our review of the STB's website found no such letter on the record. Consequently, we have had no opportunity to read that letter or to reply to remarks that ALA may have made therein.

ALA's Reply Comments Are a Continuation of the Lighting Industry's Retaliatory Letter-Writing Campaign against the NCC

We have, however, read ALA's March 22 letter calling on the STB to "withdraw" the NCC's antitrust immunity. Like those of the National Electrical Manufacturers Association (NEMA) and various manufacturers or shippers of lamps or lighting fixtures (lighting industry shippers), ALA's comments have been precipitated by the recent reclassification of lamps and lighting fixtures. That reclassification is discussed in some detail in our Reply Comments in this proceeding, dated April 1, 2005.[1]

ALA, along with NEMA and the lighting industry shippers, stood in opposition to the reclassification of lamps and lighting fixtures and disagreed with the action taken by

[1] See Reply Comments of National Motor Freight Traffic Association, Inc., and the National Classification Committee, Section 5a Application No. 61, dated April 1, 2005, Reply Statement of Joel L. Ringer, at pages 2-6.

the NCC. But because a classification decision by the NCC is unpopular does not mean it is unwarranted or unjustified; it does not mean the NCC acted in a manner inconsistent with its revised Section 5a Agreement; and it does not mean that the NCC's collective classification-making activities are not in the public interest. As detailed in our Reply Comments, the NCC's consideration of lamps and lighting fixtures was conducted in cooperation with shipper interests, including ALA, and in complete accord with its STB-approved Section 5a procedures. Moreover, the action taken by the NCC in reclassifying lamps and lighting fixtures was fully consistent with STB-recognized classification principles and criteria.

While NEMA, ALA and other shipper interests objected to the reclassification of lamps and lighting fixtures, they apparently could find no factual or procedural basis for challenging the NCC's decision. Though fully apprised of the remedies available to them under the NCC's revised Section 5a procedures, the lighting industry decided not to seek review by a neutral arbitrator, or as an alternative, reconsideration by the NCC. And they did not file a protest or complaint with the STB. We would suggest that NEMA, ALA and the other shipper interests realized that they could not prevail on the merits, seeing for themselves that the NCC had indeed complied with its STB-approved procedures and that the action taken by the NCC was fully consistent with STB-recognized classification principles and criteria.[2]

ALA's Comments Regarding Carrier Revenues and Shipper Costs Are Misplaced

Like NEMA and the lighting industry shippers, ALA refers to shippers' costs. It also alleges that motor carriers "can use the classifications created by the NCC to

[2] See Reply Statement of Joel L. Ringer, *supra,* at pages 7-8.

increase their revenues."[3] These comments confuse classification-making with carrier ratemaking.

As discussed in our Reply Comments, the NCC does not set freight rates. It evaluates the transportation characteristics—density, stowability, handling and liability—of goods moving by motor carrier and assigns classifications accordingly. Regardless of the particular classification(s) assigned, carriers are always free to negotiate freight rates with their shipper customers, and regularly do. Trucking is a very competitive business, and motor carrier pricing is determined by market forces. Carriers and shippers may enter into contracts, FAK (freight all kinds) rates or any other pricing mechanism as they see fit.

The reclassification of lamps and lighting fixtures—or any other classification change—cannot, and does not, impede pricing negotiations between carriers and their shipper customers. On the contrary, by providing an accurate representation of the transportation characteristics of the product(s) being shipped, the National Motor Freight Classification actually facilitates carrier-shipper pricing negotiations in a competitive environment. The value of freight classification in this regard has been recognized by the United States Congress, as we have noted elsewhere in this proceeding.

I would also point out that, in reclassifying lamps and lighting fixtures, the NCC approved class *reductions* as well as increases, and in some cases there was no resultant change in the applicable class.[4] NEMA, ALA and the lighting industry shippers have not shared this information with the STB and have, thus, mischaracterized the NCC's action.

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[3] ALA letter of March 22, 2005, at page 1.
[4] See Reply Statement of Joel L. Ringer, *supra,* Attachment A.

Allowing Shippers on the NCC Would Be Improper and Unworkable

ALA suggests that, if the STB renews the NCC's Section 5a Agreement and antitrust immunity, the agency should require that the NCC be "restructured" to provide a 50 percent shipper-50 percent carrier membership. That same recommendation has been made in this proceeding by a number of the lighting industry shippers and jointly by the National Small Shipments Traffic Conference, Inc., and National Industrial Transportation League (NASSTRAC/NITL). The inappropriateness of that approach, its impracticalities, as well as the legal impediments, have been amply addressed in our Reply Comments[5] and in these Rebuttal Comments.[6]

There is No Basis or Justification for Extending the Classification Notice and Disclosure Schedule

ALA asserts that 60 days' notice of docketed proposals and classification review matters is not sufficient; nor is 30 days for interested persons to submit new or additional information in connection with proposals. ALA would require a notification period of at least 180 days and would give shippers (and presumably any interested person) 120-150 days to respond. According to ALA, "This additional time is needed to allow persons to meet work/travel schedules and reorganize their time to adequately prepare and submit their response."[7]

ALA has furnished no evidence whatsoever showing that the NCC's current notification and disclosure schedule—predicated on the time line prescribed by the

[5] See Reply Comments of National Motor Freight Traffic Association, Inc., and the National Classification Committee, Section 5a Application No. 61, dated April 1, 2005, Reply Statement of William W. Pugh, at pages 9-11, and Legal Argument, at pages 1-3.
[6] See, for instance, Rebuttal Statement of William W. Pugh herein, at pages 4-5.
[7] ALA letter of March 22, 2005, at page 2.

STB[8]—is inadequate. The fact is that, in considering the reclassification of lamps and lighting fixtures, the NCC accommodated every scheduling request made by NEMA, ALA and the lighting industry shippers.

The proposal to amend the classification of lamps and lighting fixtures was initially heard by the Classification Panel that met on May 4, 2004. The lighting industry's lead representative at the time, Donald S. Varshine of Keystone Dedicated Logistics, who represented both NEMA and ALA, attended the May 4 meeting along with six other shipper representatives. They stated that they had not had sufficient time to conduct their own study on the transportation characteristics of the involved products and asked the Panel for the opportunity to do so. Mr. Varshine and the other shipper representatives in attendance volunteered that they could conduct their survey and have the results available for the full NCC to consider at its meeting on August 3, 2004. The Panel agreed to the lighting industry's request. The proposal was disapproved and redocketed for consideration by the full NCC in August.

As a further accommodation to the lighting industry, the NCC rearranged its August meeting agenda so that Mr. Varshine could avoid a potential scheduling conflict unrelated to NCC or NMFTA business.

Neither Mr. Varshine nor anyone else from the lighting industry asked for more time to complete their survey. And with the meeting agenda altered at the request of Mr. Varshine, no one indicated that attending the NCC's August meeting presented a hardship. Indeed, Mr. Varshine, on behalf of NEMA and ALA, timely submitted the results of the lighting industry's survey, which he said represented over a million

[8] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, decided and served November 20, 2001, Appendix B.

"transactions"—albeit without the supporting raw data—for consideration by the NCC at the August meeting.[9] And 12 shipper representatives, including Mr. Varshine and Richard D. Upton, President and CEO of ALA, attended the meeting and addressed the NCC.

How can ALA now argue that the NCC's procedures do not afford interested persons enough time to "adequately prepare and submit their response" to docketed proposals? ALA wants a six-month notification period with a four-to-five-month response period, so interested persons can "meet work/travel schedules and reorganize their time..." Should shippers have to wait six months to obtain a class *reduction?* Should amendments to NMFC packaging specifications, which might save shippers money on operational costs or reduce the incidence of claims, be delayed six months? Or should description changes to update or clarify the provisions of the NMFC require six months to be made?

During the previous Section 5a proceeding, more than one shipper group called on the STB to require 90 days' notice of classification proposals and access to the information in the NCC's public docket files. The STB rejected that idea in favor of 60 days: [10]

> We support a notice period that is sufficient to permit parties to formulate their response to a classification proposal without unduly delaying action on proposals. We find that 60 days' advance notice of proposals is needed, and should be sufficient, to enable parties to gather information and plan their participation in classification matters...

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[9] In accord with the NCC's revised Section 5a procedures, the lighting industry's information would have to be—and was—submitted no later than 30 days prior to the NCC's August 3, 2004 meeting. Our records show that Mr. Varshine submitted the results of the lighting industry's survey on July 2, 2004, *32* days before the meeting.

[10] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* at page 12.

With respect to availability of the NCC's public docket files, the STB stated:[11]

> We think that 90 days is excessive and would unduly delay the processing of classification proposals. However...we find that 60 days' access to the reports, studies, and raw data underlying a classification proposal should be sufficient for interested parties to analyze and verify the data, without unduly delaying classification proposals. As for other material...that interested parties wish the NCC to consider in deciding a proposal, it would seem to us that 30 days should be a sufficient time for access... (Emphasis ours.)

The STB saw that 90 days would be excessively dilatory. Certainly, requiring *180* days' notice would destroy the NCC's ability to timely make changes to the NMFC. It would appear that crippling the NCC and the classification system by unduly delaying action on classification proposals is ALA's goal.

I, Joel L. Ringer, state that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on April 21, 2005.

Joel L. Ringer

JOEL L. RINGER

[11] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* at page 14.

SECTION III

ARGUMENT

III.
Argument

A. Congress Has Long Rejected the Termination of Antitrust Immunity for Collective Classification Activities.

Throughout the many legislative changes that have occurred since the Motor Carrier Act of 1980 through the Motor Carrier Safety Improvement Act of 1999, Congress, notwithstanding opposition from some, has continued to offer antitrust immunity to protect the collective establishment of the motor carrier freight classification.

In his January 7, 1998 Comments in a prior proceeding in Section 5a Agreement No. 61, National Classification Committee – Agreement, Congressman Nick J. Rahall, II, then Ranking Democratic Member of the Committee on Transportation and Infrastructure, revisited Congress' acknowledged regard for the motor carriers' freight classification. As pertinent, in discussing the deliberations in the House which ultimately created the Interstate Commerce Commission Termination Act of 1995, Congressman Rahall related that:

> In fact, in the House of Representatives, there was never a question that we would not maintain immunity for commodity classifications with provision for this practice included in every draft of H.R. 2539 considered, from its introduction, through the Committee process, and as passed by the House. (Rep. Rahall Comments, p. 2)

Further, in explaining the basis for his support for continuing antitrust immunity for the NMFC, Congressman Rahall stated that:

> I believed then, as I do today, that the efficient operation of the motor carrier industry, and its ability to serve both shippers and consumers alike, depended on the continuation of commodity classifications. In this regard, the hearing record developed during consideration of the 1995 Act (as well as records developed in preceding legislative actions going back to 1980) clearly showed

> that motor carriers could not, and would not, meet collectively without immunity. It is a fact that tremendous volumes of traffic move in LTL service, rather than under contract or FAK, but subject to their proper classification. No system other than the National Classification Committee Agreement provides for the grouping of products with comparable characteristics, or the separation of products that are dissimilar, for transportation purposes. (Rep. Rahall Comments, p. 3)

NASSTRAC/NITL, DOT and the ALA, in their reply comments, object to the continuation of antitrust immunity because it may be used in a "noncompetitive way"; is not needed; or is "not appropriate in today's deregulated economy." (See NASSTRAC/NITL Reply, p. 1; DOT Reply, p. 1; and ALA Reply, p. 1) Congress, as evidenced by its legislative enactments dealing with motor carrier associations engaged in collective ratemaking and classification-making, obviously does not agree with those unfounded criticisms.

Further, this is not the proper forum or proceeding to contend that antitrust immunity should be denied to collective classification-making activities. The statutory determination that antitrust immunity should be conferred on approved Section 5a Agreements is within the province of Congress. The issue as to whether the NCC's Section 5a Agreement should be further modified or terminated is dependent upon the determination that such action is "necessary to protect the public interest," and not whether antitrust immunity is opposed by some. There is no showing that the classification is anything but the "useful tool" Congress has identified it to be, or that the approved classification procedures are in any way harmful to the public interest.

B. The Agency-Prescribed Classification Standards Do Not Burden Shippers.

NASSTRAC/NITL's claim that classification standards favor carriers over shippers ignores the fact that those criteria were developed and/or approved by the former

ICC. (See NASSTRAC/NITL Reply, p. 2) Thus, those standards are neither subjective nor the product of motor carrier invention. As far back as 1943, in Motor Carrier Rates in New England, 47 M.C.C. 657, 660-661, the ICC categorized and designated the then 15 transportation characteristics which must be considered by motor carriers in establishing classification ratings. Then, some 35 years later in 1978, the ICC instituted an investigation into the motor carrier classification in Ex Parte No. MC-98 (Sub-No. 1). That proceeding spanned a five-year period, and as pertinent, in Investigation Into Motor Carrier Classification, 367 I.C.C. 715 (1983), the ICC, upon reconsideration, finally revised the previously recognized 15 elements of classification. Excluded were the elements of trade conditions, value of service, and competition with other commodities which were concluded to be economic factors, and more properly were to be considered as part of the carrier ratemaking process. The remaining 12 elements were condensed into four composite classification factors: (1) density; (2) stowability, which includes excessive weight or excessive length; (3) ease or difficulty of handling goods, which includes the necessity of special care or attention; and (4) liability, which considers value per pound, the susceptibility to theft, liability to damage, liability to damage other commodities with which it is transported, liability to spontaneous combustion or explosion, and perishability.[1]

Those are the very same standards which have guided the NCC in establishing classifications and reclassifications for the past 32 years. Moreover, as previously pointed out, there is nothing subjective in either the evaluation of those characteristics or

[1] Ironically, in that proceeding NASSTRAC and NITL, which are here challenging the objectivity of the present classification standards, in support of the NCC successfully disputed the ICC's ranking of the importance of the recognized liability factors, with those shipper associations demonstrating how the importance of each of the six underlying liability factors changes with the nature of the article. (See 367 I.C.C. at 717.)

the assignment of classification ratings. The NCC's burden in justifying a classification change is, and always has been, the showing that the class rating proposed bears a reasonable relationship to the class ratings presently applicable on articles exhibiting the same or comparable transportation characteristics. (See Batteries in D.C. and PA. Over Tidewater Exp. Lines, 18 M.C.C. 118 (1939); Motor Class. Rating On Candy or Confectionery, 353 I.C.C. 314 (1977); and Investigation and Suspension Docket No. M-30436, Classification Ratings On Intermediate Bulk Containers, National Motor Freight Classification, Decision, dated August 30, 1994, at pp. 6-7 (not printed). The standards applied by the carriers are agency-prescribed and not carrier-created.

C. Shippers Are Not Proper Parties to Determine the Establishment of Motor Carrier Classifications.

The demand of shippers that they sit on the NCC and have an equal vote is not new. (See ALA Reply, p. 1; and NASSTRAC/NITL Reply, p. 2) That very contention was raised and rejected by the ICC in Investigation Into Motor Carrier Classification, 367 I.C.C. 243 (1983). There, the ICC concluded that:

> Shipper participation in the classification process.—A number of shippers argue that they should be able to participate as equal partners in the carrier classification process. We do not agree. The classification is properly within the managerial prerogative of the carriers, although shippers have the right to be heard under the rate bureau agreement. Shippers may seek redress from the Commission if their interests are not protected in the classification process. (367 I.C.C. at 355)

That issue was again raised by shipper representatives in the recently concluded review of the classification process in Section 5a Application No. 61 (Sub-No. 6), National Classification Committee—Agreement. In its Decision served on November 20,

2001, the Board rejected the request for shipper voting on classification matters concluding that:

> The issue of the permissibility of shipper voting is not free from doubt, and we take no position on whether carriers and shippers voluntarily could agree to shipper participation in establishing classifications. But, in our view, it is not necessary or appropriate to require shipper voting because providing a right of review by a neutral arbitrator should foster shipper confidence in the fairness of the process. Similarly, we do not believe that it is necessary or appropriate to require the NCC to "outsource" initial classification decisions to a separate entity. (2001 Decision, p. 19)

Without even attempting to utilize arbitration, and ALA even having declined to use that process with respect to the recent reclassification of lamps and lighting fixtures, those organizations insist that the process will only be fair if they have an equal vote on classification maters. The opposition voiced by those parties in this record to freight classification leaves no room for doubt that they lack impartiality and would use their votes as shippers, even if permissible under the law, to defeat required commodity classifications or reclassifications. Just as the Board concluded that shipper voting is "not necessary or appropriate" in the prior proceeding, that same result is even more justified here where it has been demonstrated that proper classification decisions would not be reached by "outsourcing" such determinations to shippers—especially because they have not even attempted to use arbitration which they insisted would instill confidence in the fairness of the process.

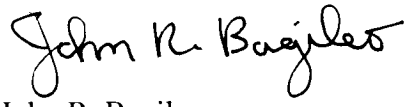
SECTION IV

CONCLUSION

IV.
Conclusion

For the reasons set forth in NMFTA's and NCC's Opening, Reply and Rebuttal Comments, it is submitted that no changes to the NCC's recently approved Section 5a Agreement necessary to protect the public interest have been identified. Certainly, no just cause has been shown warranting the termination of the NCC's collective classification-making activities.

Respectfully submitted,



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Due and Dated: April 21, 2005